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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 352

GEMCO MANUFACTURING COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 29, 1929

CERTIORARI GRANTED NOVEMBER 4, 1929

(34,483)

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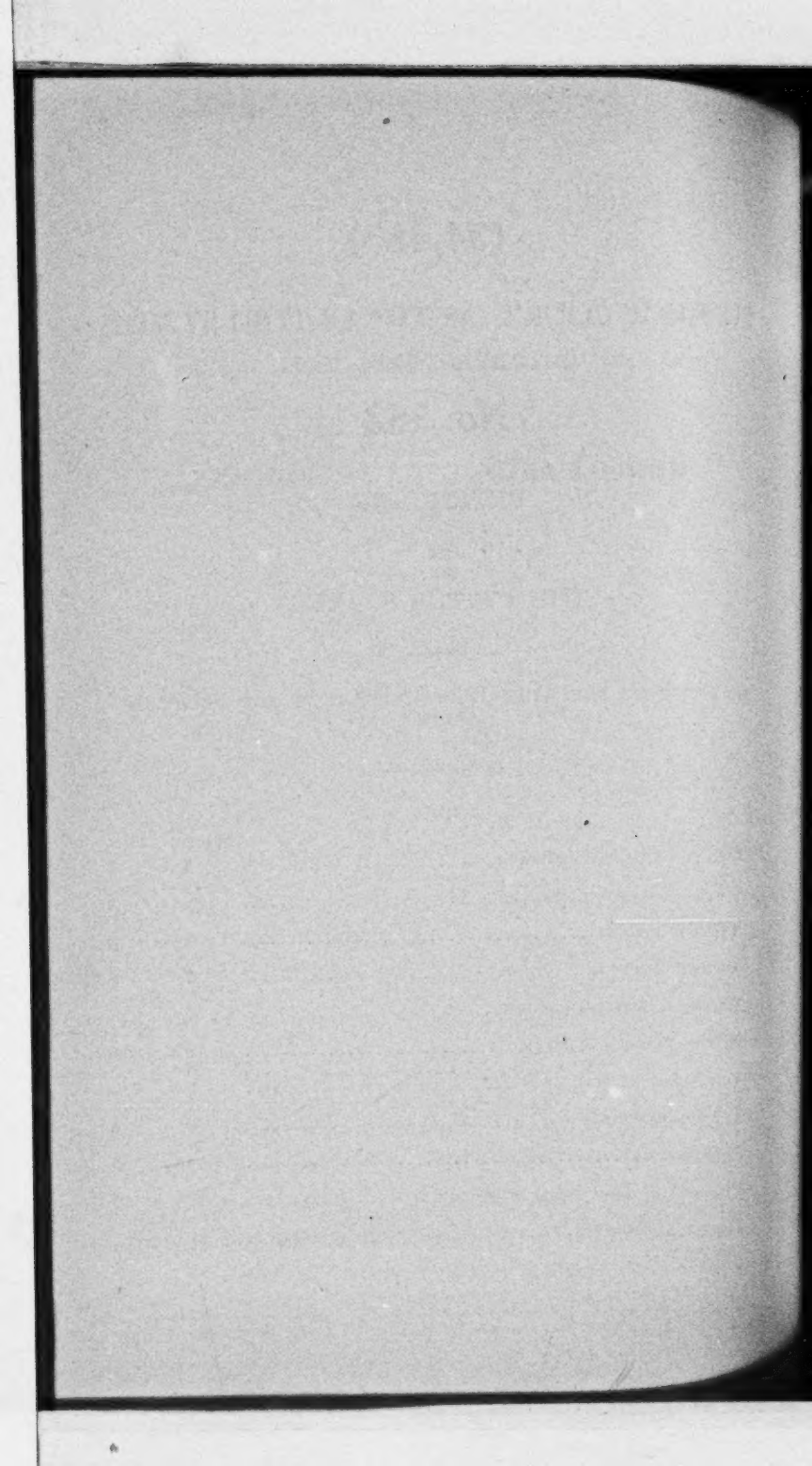

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 352

GEMCO MANUFACTURING COMPANY, a Corporation,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MAY IT PLEASE THE COURT: Your petitioner, Gemco Manufacturing Company, by its attorney, respectfully prays for a writ of certiorari to review the judgment of the United States Court of Claims in the above entitled cause.

Statement of the Case

The petitioner corporation is the manufacturer and distributor, among other things, of bumpers for use on automobiles of various makes and designs. It manufactures and sells not only complete bumper assemblies, ready to be affixed or attached to automobiles, but also manufactures and sells to the automotive trade replacement parts for such bumpers, such as bars, brackets and fittings. These bumper parts are sold as separate articles or items, and are used principally by garages and repairmen, to replace damaged and broken parts of bumpers. Separate and complete records are kept of all sales of bumper parts, as distinguished from complete bumpers or bumper assemblies.

On all sales of complete bumpers or bumper assemblies, petitioner corporation made proper return and payment of the tax imposed under subdivision (3) of Section 900 of the Revenue Act of 1921, and makes no contention that this tax was not properly and legally assessed and collected.

However, on sales of parts for bumpers, between the dates of November 1, 1922, and July 2, 1924, petitioner corpora-

tion was required to pay taxes in the amount of $32,040.86, notwithstanding the fact that the taxing statute imposed no tax on sales of *parts of accessories,* but only on sales of complete accessories.

Claim for refund of the $32,040.86 so paid on sales of bumper parts was duly filed with the Commissioner of Internal Revenue, and rejected or disallowed by the Commissioner, whereupon suit was instituted in the Court of Claims for recovery of this amount.

Subdivision (3) of Section 900 of the Revenue Act of 1921 (42 Stats. 227), under alleged authority of which the taxes sought to be recovered were levied, assessed, collected and paid, imposed a tax on the manufacturers' sale of "parts" *or* "accessories" for any of the articles *enumerated in subdivision* (1) *or* (2) of such section.

The articles enumerated in said subdivision (1) and (2), as found by the Court of Claims in its decision in the case of Martin Rocking Fifth Wheel Co. v. The United States (60 Ct. Cls. 466), are only (1) automobile trucks (2) automobile wagons (3) other automobiles, and (4) motor cycles. Bumpers are not enumerated in subdivision (1) or (2), but are "accessories", enumerated or included in subdivision (3), and it is the contention of petitioner corporation that since subdivision (3) of Section 900 of the Revenue Act of 1921 imposed a tax on sales of "parts" for only the articles enumerated in subdivisions (1) and (2), and not on sales of [fols. 2 & 3] parts for articles enumerated in subdivision (3), the taxes so paid by it were collected without authority of law.

The case presents for determination by the Court the question of whether bumper parts manufactured and sold by petitioner corporation are "parts" for articles enumerated in subdivision (1) or (2), within the meaning of subdivision (3) of Section 900 of the Revenue Act of 1921.

Reasons Relied on for Allowance of the Writ

The writ herein sought should issue for the following reasons:

1. The Court of Claims has decided an important question of Federal taxation which has not been, but should be settled by this Court.

2. The decision of the Court of Claims is contrary to the principle laid down by that Court in interpreting subdivision (3) of Section 900 of the Revenue Act of 1918 (40 Stats. 1122), which is identical to the provision of the 1921 Act here involved, in the case of *Martin Rocking Fifth Wheel Co.* v. *The United States*, 60 Ct. Cls. 466.

3. The decision of the Court of Claims is inconsistent with the decision rendered by itself, on February 4, 1929, in the case of the *Auburn Rubber Co.* v. *The United States*, interpreting the same provision of the taxing statute here involved, in which decision it was held that patches and reliners for tires enumerated in subdivision (3) were not subject to the tax imposed under that subdivision.

4. The decision of the Court of Claims violates the rule laid down in the cases of *Gould* v. *Gould* (245 U. S. 151) and *United States* v. *Merriam* (263 U. S. 179), heretofore universally followed by the Federal Courts, in that it extends the application of Section 900 (3) of the Revenue Act of 1921 so as to bring within its scope articles or things which are not enumerated or included therein.

Wherefore, your petitioner respectfully prays that a writ of certiorari to review the judgment of the Court of Claims herein may be granted.

George M. Wilmeth, Attorney for Petitioner, Transportation Building, Washington, D. C.

[fol. 1] IN THE COURT OF CLAIMS

No. F-292

GEMCO MANUFACTURING COMPANY, a Corporation, Claimant,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed September 13, 1926

To the Honorable the Court of Claims:

The Claimant, Gemco Manufacturing Company, respectfully represents to the Court that:

1. It is, and at all times mentioned herein has been, a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at Milwaukee, Wisconsin.

2. Claimant is the manufacturer and distributor, among other things, of bumpers for use on automobiles of various makes and designs. It manufactures and sells not only complete bumper assemblies, ready to be attached or affixed to automobiles, but also manufactures and sells to the automotive trade parts for such bumpers, such as bars, brackets, and fittings. The latter are sold as separate articles or items, and are used principally by garages and repairmen to replace damaged or broken parts of bumpers. Separate and complete records are kept of all sales of parts as distinguished from completed bumpers.

[fol. 2] 3. Section 900 of the Revenue Act of 1921 (42 Stats. 227) provided—

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof) 3 per centum.

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

Pursuant to the provisions of said Act, on or about January 6, 1922, the Commissioner of Internal Revenue, with

the approval of the Secretary of the Treasury, promulgated certain regulations, known as "Regulations No. 47 (Revised)," relating to the Excise Taxes on Sales by the Manufacturer under Section 900 of the Revenue Act of 1921, which said regulations provided, in part, as follows:

Art. 15. Definition of Parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristics is not such a commercial commodity [fol. 3] as would ordinarily be sold for general use, and which is primarily adapted only for use as a component part of such vehicle.

Art. 16. Definition of Accessories.—An "accessory" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

4. Between the dates of November 1, 1922, and July 2, 1924, there were levied, assessed against, and collected from claimant, and paid by claimant to the United States Collector of Internal Revenue at Milwaukee, Wisconsin, taxes in the amount of $32,040.86 on sales by claimant of parts for bumpers, as hereinbefore described. Said taxes were purported to have been levied, assessed, and collected under the provisions or authority of subdivision three (3) of Section 900 of the Revenue Act of 1921, supra.

On or about March 16, 1926, claimant filed with the Commissioner of Internal Revenue a claim for refund of said sum of $32,040.86 alleging as reasons for the allowance of said claim, in substance, as follows:

(a) That the amount claimed was paid on bumper parts —bars, brackets, and other bumper parts,—sold separately, and not as a part of a complete bumper assembly.

(b) That since subdivision (3) of Section 900 of the Revenue Act of 1921 imposed a tax on the manufacturer's

sale of parts of accessories for articles enumerated in subdivisions (1) or (2); and that since accessories were not enumerated in subdivisions (1) or (2), there was no authority of law for taxing sales of parts for accessories when sold separately.

[fol. 4] 5. In a letter from the Acting Commissioner of Internal Revenue bearing date of August 27, 1926, claimant was advised of the rejection of said claim for refund as follows:

Reference is made to your claim filed for refund of $32,040.86, representing manufacturer's excise tax paid for the months of December, 1922, to September, 1924, inclusive.

The claim is based upon the contention that the amount claimed was paid on the sale of bumper bars, brackets, and other bumper parts sold separately, and you consider that parts of automobile parts or accessories are not properly taxable, and that tax paid thereon should be refunded.

You are advised that bumper brackets and bumper bars are properly subject to tax as automobile parts under Section 900 of the Revenue Act of 1921, and Section 600 of the Revenue Act of 1924, even though sold separately.

It was suggested under several dates that in the event you had a list showing bumper parts other than bars or brackets on which a portion of this tax was paid, that such list be submitted and the amount of tax paid on each class of articles be shown thereon.

In reply to these letters you advised that the amount which was paid on fittings other than bars and brackets is too small to warrant the compilation of the figures, and you prefer to have the claim considered as a whole rather than to segregate the amount of tax applying to fittings, which this office might consider not to be subject to tax. Therefore, since bumper bars and brackets are, as stated above, properly subject to tax as automobile parts, and no evidence has been presented to show what portion, if any, of the tax claimed was paid on the sale of nontaxable articles, the entire amount claimed is considered to have been correctly paid, and the claim is accordingly rejected.

[fol. 5] 6. Claimant is advised by counsel, and therefore avers, that the taxes collected from it on the sale of bumper

parts, as aforesaid, are illegal and erroneous and were illegally and erroneously assessed and collected by the United States of America through said Collector of Internal Revenue at Milwaukee, Wisconsin, without warrant or authority of law, for the following reasons:

(a) Subdivision (3) of Section 900 of the Revenue Act of 1921 imposed a tax of 5 per centum only on the sales of "* * * parts or accessories" for articles enumerated in subdivision (1) or (2) of said Section; that is to say, parts or accessories for automobile trucks or wagons, other automobiles and motor cycles.

(b) A bumper is an accessory for an automobile, or, in other words, it is one of the articles enumerated in subdivision (3) of Section 900 of the Revenue Act of 1921.

(c) The Revenue Act of 1921 contains no provision, either in Section 900 or elsewhere, authorizing the imposition of any tax on the sale or lease of "parts" for any of the articles enumerated in subdivision (3) of Section 900 thereof.

Claimant therefore claims from the United States the sum of $32,040.86, with interest at the rate of six (6) per centum per annum, as provided by law.

7. No action upon this claim other than herein set forth has been had before Congress or any other of the departments of the Government. Claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States and has not at any time in any way aided, abetted or given encouragement to [fol. 6] rebellion against said Government; it is the sole owner of the claim herein stated, and no part of said claim has ever been sold, assigned or discharged, and it is justly entitled to the amount herein claimed from the United States after allowing all just credits and off-sets.

And the claimant claims $32,040.86 with interest at the rate of six (6) per centum per annum, as provided by law.

Gemco Manufacturing Company, by George M. Wilmeth, Attorney for Claimant, Transportation Building, Washington, D. C.

Duly sworn to by George M. Wilmeth. Jurat omitted in printing.

[fol. 7] II. General Traverse—Filed November 12, 1926

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission

On February 4, 1929, this case was argued and submitted on merits by Mr. George M. Wilmeth, for the plaintiff, and by Mr. Ralph C. Williamson, for defendant.

[fol. 8] IV. **Special Findings of Fact, Conclusion of Law, and Memorandum by the Court**—Filed March 11, 1929

This case, having been heard by the Court of Claims, the Court, upon the evidence, makes the following

Special Findings of Fact

I

Plaintiff is and at all times mentioned herein has been a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at Milwaukee, in that State.

II

Plaintiff was during the period in question engaged in the manufacture, sale, and distribution, among other things, of bumpers for automobiles, and bars, brackets, and fittings for use as replacement parts of such bumpers.

Said articles were especially designed, manufactured, and sold for use on or in connection with automobiles, and are not adapted for any other purpose or use. With respect to the manufacture and sale of such articles, plaintiff, during the period in question, made returns for paid excise

taxes for the amount of $32,040.86. Claim for refund in proper form and in due time was filed by plaintiff. Said claim for refund was rejected by the Commissioner of Internal Revenue.

III

Plaintiff is a citizen of the United States, and it and its officers and directors have always borne true allegiance to the Government of the United States, and have never voluntarily aided, abetted, or given encouragement to rebellion against said Government. No part of the claim sued for has ever been sold, assigned, or satisfied.

[fol. 9] CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be ascertained by the clerk and collected by him according to law.

MEMORANDUM

The issue involved in this case has been many times before the court. The case, we think, falls within the following decisions: Cole Storage Battery Co. v. United States, 65 C. Cls. 164; Walker Mfg. Co. v. United States, 65 C. Cls. 394; Advance Automobile Accessories Corporation v. United States, No. H-3 decided October 22, 1928; Carbon Steel Co. v. Lewellyn, 251 U. S. 501; Forged Steel Wheel Co. v. Lewellyn, 251 U. S. 511; Worth Bros. Co. v. Lederer, 251 U. S. 507. The petition will be dismissed. It is so ordered.

[fol. 10] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 11th day of March, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him according to law, which amount is found to be $26.22.

VI. Proceedings After Entry of Judgment

On May 10, 1929, the plaintiff filed a motion for a new trial.

On June 10, 1929, the court entered the following order on said motion:

Order

It is ordered this 10th day of June, 1929, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 11] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,483. Court of Claims. Term No. 352. Gemco Manufacturing Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 29, 1929. File No. 34,483.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 4, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is assigned for argument with cases Nos. 127 and 275 as one case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.